NO. 82-6203

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

ALEX WAKEMAN AND ROBERT TEN FINGERS

Appellants,

v.

STATE OF SOUTH DAKOTA,

Appellee.

ON APPEAL FROM THE SUPREME COURT
SOUTH DAKOTA

MOTION TO DISMISS OR AFFIRM

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COMES NOW the Appellee and hereby moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme

Court of South Dakota on the grounds that no substantial federal question is involved and that no preemption of state law by federal regulation is present.

I

THE STATE STATUTES INVOLVED AND THE NATURE OF THE CASE.

A. THE STATUTES.

This appeal raises the issue of the validity of the application of the South Dakota open fire statutes, SDCL 34-35-16 and 34-35-17, to individuals starting such fires in the Black Hills National Forest.

SDCL 34-35-16 requires that a permit be obtained from either the State Forester or the United States Forest Supervisor, or from one of their designees, before starting an open fire in the Black Hills forest fire protection district. The forest fire protection district encompasses the Black Hills National Forest.

SDCL 34-35-17 sets out the requirements governing the issuance of permits for open fires in the Black Hills forest fire protection district. The permit may be issued after a determination that such a fire will endanger neither life nor property and that the location of the fire and climatic conditions pose no threat to safety and property. The permit may include conditions and restrictions, and is subject to revocation.

B. PROCEEDINGS BELOW.

Appellants are part of a group arrested on November 15, 1981, for starting an open fire in the Black Hills fire protection district without a permit, in violation of SDCL 34-35-16. The Appellants were convicted of the above violation by the Circuit Court, Seventh Judicial Circuit, Custer County, South Dakota, on December 8, 1981.

The Appellants appealed their convictions to the South Dakota Supreme Court and that Court, on November 10, 1982, affirmed the circuit court's

decision. The opinion of the South Dakota Supreme Court is State of South Dakota v. Dewey Brave Heart, et al., 326 N.W.2d 220 (S.D. 1982).

C. STATEMENT OF FACTS

Appellants were members of an encampment begun in the Black Hills forest fire protection district about the middle of October, 1981. The Appellants made a request, on November 12, 1981, through another individual, for a permit to burn an open fire in the fire protection district. The request was directed to the United States Forest Service Ranger, who denied the application because it failed to specify the fire's location, date, time, and a person to be present at the fire location at time of burning. The Ranger also indicated that weather conditions precluded issuance of a permit at that time and that no permits would be issued until the weather changed.

The Appellants made no attempt to correct the deficiencies in their request nor did they

apply for a permit when weather conditions changed. The Appellants, as noted supra, were arrested on November 15, 1981, by South Dakota law enforcement officials, who came to the scene of the encampment and discovered the open fires. The Appellants' convictions and subsequent appeals to the Supreme Court of South Dakota and this Court followed.

II

ARGUMENT

A. THE CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The Appellants' contention that South Dakota's open fire statute, SDCL 34-35-16, is repugnant to the First Amendment to the United States Constitution and that the statute's application prohibited the Appellants from using open fires for religious purposes is totally without merit.

The Appellants assert that, as putative members of the Lakota Indian Nation, they sought

to burn open fires in the Black Hills National Forest as part of their religious ceremonies. They contended applying the open fire statute to them prohibited the free exercise of their religion.

The free exercise of one's religious convictions has been a right zealously protected by the decisions of this Court. However, following the tenets and practices of one's religious beliefs has not been held to be wholly outside the reach of state regulation. "The state interest must be of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15, 24 (1972). State interests of the "highest order" can outweigh legitimate claims under the Free Exercise Clause. Wisconsin v. Yoder, supra, 32 L.Ed.2d 25. Conduct or actions which posed a substantial threat to the public safety and order have been

held to be legitimately regulated by the state, although such behavior was religiously motivated. See, Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965, 970 (1963).

The plaintiffs' showing of the "coercive effect," see, Board of Education v. Allen, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968); Thomas v. Review Board, Indiana Employment Security Division, 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981), of the challenged regulation or statute must be balanced against the interest which the state seeks to uphold. Finally, the state may justify an impingement upon religious liberty by showing that its regulation is "the least restrictive means of achieving some compelling state interest." Thomas, supra, 67 L.Ed.2d at 634.

Applying the above principles to the instant appeal, it is clear that no violation of the Appellants' First Amendment rights occurred. The State, in enforcing its open fire statute, was

exercising its police power to ensure the protection of people and property. The Appellants did not provide, in the request for a permit, the location or the date when the fire would commence. The dangers of a possibly unattended fire in a thickly wooded National Forest are obvious, and justified the State's prohibiting such a fire where the Appellants had failed to indicate that they would follow proper and necessary procedures.

In addition, the forest ranger's refusal of the application for a permit listed unfavorable weather conditions as a reason for denying the Appellants' request.

Despite their initial failure to secure a permit, the Appellants were not denied the right to freely exercise their religion. The Appellants could have reapplied for a permit, but chose to burn their fires in violation of the law. The minimal requirements that were imposed on the Appellants, e.g., date, time, and location of fire;

insuring that the fire would not be unattended, did not place an onerous burden upon the exercise of Appellants' First Amendment rights. In this instance, those rights were properly subordinated to the State's interest in insuring that possibly dangerous fires are properly contained.

B. THE SOUTH DAKOTA FIRE STATUTES HAVE NOT BEEN PREEMPTED EITHER BY THE FT. LARAMIE TREATY OF 1868 OR FEDERAL REGULATIONS CONCERNING THE PROTECTION OF NATIONAL FORESTS.

The Appellants' contention that the South Dakota open fire statute as applied by the Appellee to Appellants' use of open pit ceremonial fires has been preempted by the 1868 Ft. Laramie Treaty, and therefore is invalid as repugnant to the Treaty and Article VI, Clause 2 of the United States Constitution is without merit.

The Ft. Laramie Treaty of 1868, 15 Stat. 635, established the Great Sioux Reservation, with boundaries which encompassed what is half

of the area of South Dakota. United States v. Sioux Nation of Indians, 448 U.S. 371, 100 S.Ct. 2716, 65 L.Ed.2d 844, 850, n.2 (1980). The Treaty was abrogated, however, by the Act of 1877, 19 Stat. 254. The 1877 Act provided that the Black Hills were ceded to the United States, in exchange for the Government's agreement to provide the tribes with subsistence rations.

The fact that Congress abrogated the 1868 Ft. Laramie Treaty disposes of Appellants' claim that the state law is preempted by the terms of that agreement. The Treaty having no legal existence, it cannot be said to preempt enforcement of State law. The question of whether Indian treaty rights survived abrogation of particular treaties is inapposite. The rights of Indians, and of all Americans, to exercise their First Amendment rights is subject to the type of regulation discussed supra. Indians may have been able to retain hunting and fishing rights on

former reservation land, see Menominee Tribe v. United States, 391 U.S. 404, 88 S.Ct. 705, 20 L.Ed.2d 697 (1968), but the retention of such rights does not preclude appropriate state regulation. The Puyallup Tribe v. Department of Game of Washington, 391 U.S. 392, 88 S.Ct. 1725, 20 L.Ed.2d 689 (1968).

Appellants' contention that application of the South Dakota open fire statute as applied to Appellants' religious ceremonies is preempted by federal regulations and that said statute is therefore invalid is also without merit.

The existence of federal regulations concerning the management of National Forests does not preempt state legislation in the same area. The state statute would be void to the extent that it conflicts with a similar federal statute or regulation, but no conflict exists in the instant case.

16 U.S.C.A. § 551a authorizes the Secretary of Agriculture, in regulating the National Forests,

to cooperate with any state in which such lands are located for the purpose of enforcing state law. The language of the statute is clear concerning the State's right to enforce its laws in a National Forest: "This section [16 U.S.C.A. § 551a] shall not deprive any state or political subdivision thereof of its right to exercise civil and criminal jurisdiction, within or on lands which are a part of the national forest system." Congress obviously has no intention to preempt state authority in such areas, and lacking a congressional declaration to that effect or a federal regulatory scheme so perversive that no room remains for state control, see, Ray v. Alantic Richfield Company and Seatrain Lines, Inc., 435 U.S. 151, 98 S.Ct. 988, 55 L.Ed.2d 179 (1978), South Dakota may enforce its open fire statute within the Black Hills forest fire protection district.

In addition, the South Dakota Department of Game, Fish and Parks and the United States

Forest Service had entered into a "Cooperative Fire Control Agreement" which provides for fire protection within the Black Hills forest fire protection district. Such agreements are authorized by 16 U.S.C.A. § 565a-1. Clearly, the South Dakota open fire statute has not been preempted by federal regulations.

III

CONCLUSION

For the foregoing reasons, the appeal should be dismissed or the judgment of the court below affirmed.

Respectfully submitted,

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APPENDIX

SDCL 34-35-15. Black Hills forest fire protection district--Area included. To protect the timber on areas subject to unusual fire dangers, there is hereby created the Black Hills forest fire protection district, consisting of all that part of the state described by metes and bounds as follows: Commencing at a point on the Wyoming-South Dakota state line at the junction of the Belle Fourche river and said state line; thence southeast along the Belle Fourche river to the city of Bell Fourche; thence southeast along the Chicago and Northwestern railroad right of way through St. Onge, Whitewood, Sturgis, Tilford, Piedmont and Black Hawk to Rapid City; thence south along the Chicago and Northwestern railroad right of way through Hermosa, Fairburn and Buffalo Gap to the Cheyenne river; thence west and northwest along the Cheyenne river to the Wyoming-South Dakota state line; thence north along said state line to the place of beginning, excepting therefrom areas within the limits of incorporated towns.

SDCL 34-35-16. Permit required for open fire in Black Hills district. The starting of an open fire within the Black Hills forest fire protection district or the permitting of a fire to burn in his presence by a person or a group of persons is hereby prohibited unless a permit to do so is first obtained from the state forester or his designee or from the United States forest service supervisor or his designee. An open fire as used in this section and § 34-35-17 shall mean any fire to burn slash, brush, grass, stubble, debris, rubbish, or other inflammable material not enclosed in a stove, sparkproof incinerator, or an established fireplace approved or constructed by public agencies in designated recreation areas.

SDCL 34-35-17. Issuance of permit for open fire in Black Hills district--Conditions required. Any United States forest service supervisor, or his designee, the state forester or his designee shall have authority to issue a permit upon an application to any person to start an open fire within the Black Hills forest fire protection district if in his opinion such fire will not endanger the life or property of another, or deny such permit if in his opinion the climatic conditions or location of the material to be burned is such that the burning would endanger the life or property of others and he may issue a permit subject to such conditions and restrictions as he may consider necessary to prevent the spread of the fire permitted; and he may revoke a permit issued by him upon the change of climatic or other conditions which he considers would make the burning unsafe.

16 U.S.C.A. § 551a. Cooperation by Secretary of Agriculture with states and political subdivisions in law enforcement.

The Secretary of Agriculture, in connection with the administration and regulation of the use and occupancy of the national forests and national grasslands, is authorized to cooperate with any State or political subdivision thereof, on lands which are within or part of any unit of the national forest system, in the enforcement or supervision of the laws or ordinances of a State or subdivision thereof. Such cooperation may include the reimbursement of a State or its subdivision for expenditures incurred in connection with activities on national forest system lands. This section shall not deprive any State or political subdivision thereof of its right to exercise civil and criminal jurisdiction, within or on lands which are a part of the national forest system.

Pub.L. 92-82, Aug. 10, 1971, 85 Stat. 303

16 U.S.C.A. § 565a-1. Cooperative agreements between Secretary of Agriculture and public or private agencies, organizations, institutions, and persons covering Forest Service programs; authority; funding.

To facilitate the administration of the programs and activities of the Forest Service, the Secretary is authorized to negotiate and enter into cooperative agreements with public or private agencies, organizations, institutions, or persons to construct, operate, and maintain cooperative pollution abatement equipment and facilities, including sanitary landfills, water systems, and sewer systems; to engage in cooperative manpower and job training and development programs; to develop and publish cooperative environmental education and forest history materials; and to perform forestry protection, including fire protection, timber stand improvement, debris removal, and thinning of trees. The Secretary may enter into aforesaid agreements when he determines that the public interest will be benefited and that there exists a mutual interest other than monetary considerations. In such cooperative arrangements, the Secretary is authorized to advance or reimburse funds to cooperators from any Forest Service appropriation available for similar kinds of work or by furnishing or sharing materials, supplies, facilities, or equipment without regard to the provisions of section 529 of Title 31, relating to the advance of public moneys.

Pub.L. 94-148, § 1, Dec. 12, 1975, 89 Stat. 804.